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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-908

DR. JOHN G. MADRY, JR.,
Petitioner,

v.

DR. OTTO G. SOREL, DR. EDITH K. MANGONE, DR. JOHN T. BLACKBURN, DR. D. W. McMILLAN, BREVARD HOSPITAL ASSOCIATION, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES

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The Brief for Respondents in Opposition does not challenge directly the grounds stated for grant of the writ of certiorari. Respondents could not and do not deny that there is a division among the Circuits, although they attempt to play down the scope of the division and the importance of the issue raised.

Respondents' argument at pages 5-6 of their Brief concerning a need for nexus overlooks the many cases listed at pages A-1 through A-4 of the Petition for Writ of Certiorari in which nexus was not found to be essential [although in some cases it admittedly was, *e.g., Ward v. St. Anthony Hospital,* 476 F.2d 671, 675 (10th Cir. 1973)]. Respondents omit to state that the patient upon whom plaintiff allegedly performed the unauthorized

operation was a county welfare patient (R. 1374), whom the Respondent Hospital was required to accept as a patient by reason of § 622(f)(2) of the original Hill-Burton Act, 60 Stat. 1042 (p. A-61 of the Petition herein) and by renumbered § 603(e)(2) under the 1964 legislation (p. A-91 of the Petition herein); 42 USCA § 291c(e)(2).

The Respondents' discussion of the dissent in *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975), seems to miss the fact that two issues were raised by the Petition for Certiorari in that case. One was the issue raised herein; the other involved the constitutional right to elective abortion. The reference in the dissenting opinion to the "task of policing", 423 U.S. at 1006, appears to relate only to the latter issue.

At page 8 of their Brief, Respondents imply that federal jurisdiction as a consequence of Hill-Burton financing exists only in cases involving racial discrimination. In fact, that is only one area where jurisdiction has been found.

Of the sixteen cases listed on pages A-1 through A-4 of the Petition herein where Federal jurisdiction was found to exist, in only two, *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964), and *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), was racial discrimination the basis for the decision on the merits. In a third, *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968), racial discrimination was alleged, but the plaintiffs were found entitled to relied on non-racial grounds. Most of the other cases involved a denial of procedural "due process" and some a denial of "equal protection" by reason of residence, medical training or other non-racial, non-invidious classification.

To say that the Federal Courts have jurisdiction in "equal protection" cases, but not in "due process" cases is repugnant to the Constitution. The "due process" and "equal protection" clauses in Section 1 of the Fourteenth Amendment stand *in pari*

materia. Neither is elevated above the other. One cannot say that under our Federal Constitution one citizen's right to equal protection of the laws is superior to and more cognizable than another's right to due process of law. Nor did the Congress make any distinction in enacting 42 U.S.C. § 1983. It broad phraseology covers the entire panoply of Constitutional rights. And regardless of its Reconstruction Era origins, the Civil Rights Act of April 20, 1871, 17 Stat. 13, of which § 1983 is a part, applies equally to all citizens, not just those who have been subjected to racial discrimination. *Accord, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which assumed that a § 1983 action lay in that non-racial context if "state action" existed. (Mr. Justice Marshall's dissent in *Jackson* notes (419 U.S. at 374). "The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented.")

The existence of a double standard for "equal protection" cases and "due process" cases would itself constitute a denial of equal protection and due process.

Since the Petition herein was filed, the United States Court of Appeals for the Fifth Circuit accepted jurisdiction over another dispute between a physician and a hospital involving issues of due process of law. *Laje v. R. E. Thomason Gen'l Hospital*, 564 F.2d 1159 (5th Cir. 1977). The Court of Appeals characterized the defendant hospital as "a county hospital," without elaboration. Presumably, it would have been financed with Hill-Burton funds and apparently, like the Val Verde Memorial Hospital,[1] and unlike the Orange Memorial Hospital,[2] was considered to be county-owned.

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[1] Sosa v. Board of Managers of Val Verde Hospital, 437 F.2d 173 (5th Cir. 1971), set out at pp. A-37 *ff* of the Petition herein.

[2] Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975), set out at pp. A-17 *ff* of the petition herein.

The division among the Circuits and the rule that has developed in the Fifth Circuit that permits individual States to vary the availability of Federal jurisdiction from hospital to hospital requires the consideration of this Court so that a uniform standard of jurisdiction may be applied to all hospitals in the United States that are substantially financed with United States funds.

Respectfully submitted,

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